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### Memory laws

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## **Memory laws: regulating memory and the policing of acknowledgment and denial**

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### **Abstract:**

Laws that prohibit denial – or, the other way around – acknowledgment of gross human rights violations are, to some, important means of consolidating ‘truth-telling’, making sure certain facts cannot be contested anymore. To others, they are attempts by the state to fix an official truth while outlawing other versions of history, thus consolidating the state’s power. Such ‘memory laws’ may play a role in determining the width of the public sphere within which the memory of such conflicts is discussed. As they deal with the legacy of gross human rights violations, they can also be regarded as transitional justice mechanisms. A pertinent question is whether memory laws actually ‘succeed’ in shrinking this space for contestation. In order to provide a starting point for this discussion, this chapter provides a critical consideration of the motives states may have for prohibiting denial or acknowledgment of gross human rights violations (as illustrated by the European Court of Human Rights judgments in *Perinçek v. Switzerland*), in order to consider the implications such laws may have for the public sphere in which truth and memory of past conflicts are debated. It shows how all of the reasons that state authorities may have for adopting memory laws engender their own problems; the tentative conclusion is that the potential of memory laws to police the public sphere after mass atrocity is disputable.

### **Introduction**

In 2014, in the context of the Ukraine conflict that was stirring up all kinds of memories and sensitivities related to the region’s past, the Russian president Putin signed a law to criminalize expressions that distort the Soviet Union’s role in World War II, as well as denial of Nazi crimes.<sup>1</sup> Meanwhile, France is still in the middle of a debate on the prohibition of

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<sup>1</sup> Reuters.com, 5 May 2014.

denying the Armenian genocide – whereas in Turkey persons have been jailed for *acknowledging* that event.

Laws that prohibit denial – or, the other way around, acknowledgment – of gross human rights violations are, to some, important means of consolidating the ‘truth’ about such atrocities, making sure certain facts can no longer be publicly contested. To others, they are attempts by the state to fix an official truth while outlawing other versions of history, thus consolidating the state’s power in determining what should be regarded as ‘truth’. Such laws – which I term ‘memory laws’ – may thus play a role in determining the width of the public sphere within which the memory of such conflicts is discussed. As they deal with the legacy of gross human rights violations, they can also be regarded as transitional justice mechanisms.

A pertinent question is whether memory laws actually ‘succeed’ in shrinking this public space for contestation – to answer this, more empirical research is needed. For now, let us start by critically considering the motives states may have to prohibit such speech in the aftermath of gross human rights violations. These motives are aptly illustrated in the European Court of Human Rights (ECtHR) case of *Perinçek v. Switzerland*<sup>2</sup> – where a politician’s conviction for denying the Armenian genocide was judged a violation of freedom of expression.

This case makes clear that memory laws bring up several pressing questions: how to determine which groups shall be protected, and over how many generations. Is it even possible to set limits to the public sphere after a certain lapse of time? Which mass atrocities – and what kinds of expressions about those atrocities – should be put beyond contestation? Is it possible to adopt memory laws while protecting the public sphere of contestation over the past from becoming so restricted that ‘coming to terms with the past’ implies repressive practices? This contribution analyses the motives for prohibiting denial or acknowledgment of gross human rights violations, as illustrated by the *Perinçek* case, in order to consider the implications such laws may have for the public sphere in which truth and memory of past conflicts are debated.

## **Memory laws**

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<sup>2</sup> ECtHR *Perinçek v Switzerland*, 17 December 2013 ; ECtHR *Perinçek v Switzerland* (Grand Chamber) 15 October 2015, appl.no. 27510/08.

I define 'memory laws' as (criminal, civil or administrative) laws that implicitly or explicitly prohibit or restrain expressions about gross human rights violations in the past. They may be targeted at denial or at acknowledgment of what happened. Laws can be explicitly tied to a situation (such as criminalization of 'Holocaust denial') or can be formulated in a more general manner (such as 'incitement to hatred' legislation that several states interpret as including genocide denial<sup>3</sup>).

Most research in this field has focused on denial: particularly Holocaust denial. Whereas negationists deny that mass human rights violations happened at all, revisionists contest conventional views about the interpretation of, and responsibility, for such crimes, which is thus more difficult to separate from historiography.<sup>4</sup> Besides negation, laws sometimes also extend to minimization, justification or glorification of gross human rights violations – which may include atrocities in the present and future.

Cohen has identified different forms of denial: literal denial of the facts, interpretive denial (giving the facts a different meaning; euphemisms, blaming the other party, isolating the facts as incidents, etc.), and implicatory denial (denying the moral or political implications of the facts, including appeals to higher loyalties and advantageous comparisons).<sup>5</sup> Hennebel and Hochmann point to the distinction that is made in German scholarship between 'bare denial' and 'aggravated denial'; the latter explicitly targets a group of people (e.g. by accusing them of lying).<sup>6</sup>

In his research on the idea-vocabulary of genocide denials, Charny has identified various methods commonly used by deniers of known genocides, which include, amongst other things, denying the facts of the genocide by transforming them into other kinds of events (such as security measures or military operations); depicting the perpetrators as victims and charging the victims with being perpetrators; insisting that the full data are not available (for example, denying the authenticity of documents, claiming that not-yet-opened archives will show a different picture); and relativism that mitigates the horror of events (for example by comparing them to natural disasters).<sup>7</sup>

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<sup>3</sup> This is also required for EU Member States: see the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, [2008] OJ L 328/55.

<sup>4</sup> E Fronza, 'The punishment of negationism: the difficult dialogue between law and memory', (2006) *Vermont law review*, 609, 614.

<sup>5</sup> S Cohen, *States of denial: knowing about atrocities and suffering*, (Cambridge, Polity, 2001).

<sup>6</sup> L Hennebel and T Hochmann, 'Introduction. Questioning the criminalization of denials' in L Hennebel and T Hochmann (eds), *Genocide denials and the law* (New York, Oxford University Press, 2011). On bare denial and hate speech, see also RA Khan, 'Holocaust denial and hate speech' in L Hennebel and T Hochmann (eds), *Genocide denials and the law* (New York, Oxford University Press, 2011) 77.

<sup>7</sup> IW Charny, 'The psychology of denial of known genocides' in IW Charny (ed), *Genocide: A Critical Bibliographic Review. Volume 2* (London, Mansell Publishing and New York, Facts on File, 1991) 3,14-15.

Such strategies may also appear simultaneously within one piece of ‘research’, whereas authors have been known to progress from literal denial (by which they soon make a mockery of themselves) towards more sophisticated forms.<sup>8</sup> Charny mentions as a separate form of genocide denial the classification of activities in other categories than genocide, mostly as wars; such arguments sometimes go together with justifications – for example explaining the events as self-defense against rebellion.<sup>9</sup>

### **Memory laws as transitional justice mechanisms**

One of the rationales most frequently put forward in favour of memory laws is that such expressions offend, defame and marginalize the victim group; the laws are meant to protect their feelings of secure existence (which may be threatened by such expressions).<sup>10</sup> This line of reasoning is often applied not only to victims’ relatives and survivors but to the group as a whole (as in ‘the Jewish community’), including later generations. The link between denial of grave crimes and defamation of victim groups can, in particular, be found in the idea that distorting the facts of such crimes is actually a means of accusing the victims of lying about what happened. Indeed, some Holocaust denial takes the vicious form of explicitly accusing eyewitnesses of being untrustworthy and merely out to obtain compensation.<sup>11</sup>

Transitional justice mechanisms, including criminal trials and truth commissions, may play a role in bringing out this ‘truth’ (though some mechanisms are arguably more appropriate for this task than others). Not only can transitional justice create *knowledge* about the facts and circumstances of gross human rights violations, it can also help to turn knowledge into official *acknowledgment* of what happened: the knowledge becomes officially sanctioned and enters the public sphere.<sup>12</sup> After a long stream of lies and denial, such truth-telling can thus have intrinsic value. With acts so abhorrent that it is hard to believe they really happened and subjugated victim groups who have long experienced denial and disbelief

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<sup>8</sup> IW Charny, ‘A classification of denials of the Holocaust and other genocides’, (2003) 1 *Journal of genocide research* 11, 14.

<sup>9</sup> Charny, *A classification of denials* (2003) 22-23.

<sup>10</sup> L Douglas, *The memory of judgment: making law and history in the trials of the Holocaust*, (New Haven, Yale University Press, 2001) 219; B Swart, ‘Denying Shoah’ in P Alldridge and CH Brants (eds), *Personal autonomy, the private sphere and criminal law: a comparative study* (Oxford, Hart, 2001) 161.

<sup>11</sup> D Fraser, “‘On the Internet, nobody knows you’re a Nazi’: some comparative legal aspects of Holocaust denial on the WWW” in I Hare and J Weinstein (eds), *Extreme speech and democracy* (Oxford, Oxford University Press, 2009) 511.

<sup>12</sup> Cohen, *States of denial* (2001) 225 (referring to a speech by Thomas Nagel).

of their accounts from other sectors of society, acknowledgment is crucial.<sup>13</sup> Denial of such grave crimes can add insult to injury exactly because the victims are – again – not believed.

In this sense, memory laws are also transitional justice mechanisms, aimed at coming to terms with the legacy of gross human rights violations from the past. Law thus ‘becomes a *space* in which the collective memory is defined’.<sup>14</sup> Truth-telling is not only vital for victims and their next of kin, but also for society as a whole to come to terms with its past. This is exemplified by the development of the ‘right to the truth’ in international law, which includes not only the right of victims/relatives to know the truth, but also implies a collective right for society.<sup>15</sup> The *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (2005), as developed by independent expert Orentlicher on request of the UN Commission on Human Rights, specifically set forth a duty for the state to preserve memory:

‘A people’s knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State’s duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.’<sup>16</sup>

In the eyes of critics, memory laws are a means to lay down one truth and to distinguish this from falsehood: a way of fixing history. The argument then goes that such laws can silence scientific criticism of common historical interpretations. Especially when questions of interpretation of, and responsibility for, atrocities come to the fore, it is difficult after all to speak of ‘the’ historical truth that should be preserved. If transitional justice is viewed as a process whereby different views and interpretations about what happened are continuously debated and contested among different actors<sup>17</sup>, it becomes clear why a public sphere in which those different visions can be set forth and discussed is so vital. It is particularly the role of

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<sup>13</sup> MU Walker, ‘Truth telling as reparations’, (2010) 4 *Metaphilosophy* 525, 536-537.

<sup>14</sup> Fronza, *The punishment of negationism* (2006) 611.

<sup>15</sup> *Annual Report of the Inter-American Commission on Human Rights 1985-1986*, OEA/Ser.L/V/II.68, Doc. 8 rev. 1, chapter V; IACtHR *Moiwana Community v Suriname* Series C no 124 (2005) par. 204; *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1 (2005); Office of the United Nations High Commissioner for Human Rights, *Study on the right to the truth*, E/CN.4/2006/91 (2006).

<sup>16</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (2005) Principle 3, [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=10800](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=10800).

<sup>17</sup> See C Brants, ‘Introduction’ in C Brants, A Hol and D Siegel (eds), *Transitional justice. Images and memories* (Aldershot, Ashgate, 2013) 1.

the *state* in proclaiming such ‘truths’ that is regarded as problematic – the role of the authorities in ruling out certain narratives.

However, there is also a different, more subtle version of the ‘truth v. falsehood’ rationale: memory laws may be means of confirming the sacral status of what happened – Holocaust denial laws form a clear example.<sup>18</sup> In a way, they resemble blasphemy laws: denial of such acts is an expression that goes against everything society stands for – an attack on that which is regarded as sacred. Thus in some jurisdictions Holocaust denial is criminalized separately (or is the only form of genocide denial that is prohibited), because of ‘the very magnitude of the rupture that the Holocaust caused to liberal and Enlightenment sensibilities. In this regard, to deny the Holocaust is not simply to offend a single group or the historical record; it is to insult the very notions of meaning upon which the liberal concept of public discourse is predicated.’<sup>19</sup> According to Margalit and Motzkin, the Holocaust has come to be viewed as a ‘negative myth of origin for the postwar world’, by which they mean that we have come to view it as ‘both a caesura that separates us from the pre-Holocaust past and as the point in time and place at which the world of our values has originated’, thus serving a mythic function in society.<sup>20</sup> I will come back to this later.

States may use various mechanisms to encourage opening up and confronting the past in the public sphere and to guard collective memory against extinction; but they also use transitional justice mechanisms to restrict debate about the past and close it to public scrutiny. Transitional justice has an important ‘forward-looking’ function in terms of reforming democratic institutions and reforming the larger societal structures that generated the conflict in the first place.<sup>21</sup> This can include legislative changes in the field of civil and political rights, such as freedom of expression; but the sensitivities involved in – and states’ negative experiences with – freedoms such as speech, association and assembly may also lead to harsh restrictions to these freedoms as a way of achieving reconciliation and preventing future atrocities. See, for instance, the broad Rwandan laws on genocide denial and genocide ideology, which cover many types of challenges to the government’s ideas on the genocide and reconciliation. The country’s experience with hate speech before and during the genocide seems to have played a role in the way freedom of speech has come to be viewed afterwards. Opposition figure Victoire Ingabire, for instance, was convicted to fifteen years’

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<sup>18</sup> Douglas, *The memory of judgment* (2001) 220.

<sup>19</sup> Douglas, *The memory of judgment* (2001) 217.

<sup>20</sup> A Margalit and G Motzkin, ‘The uniqueness of the Holocaust’ (1996) 1 *Philosophy & Public Affairs* 65, 80.

<sup>21</sup> J Balint, ‘Dealing with international crimes: towards a conceptual model of accountability and justice’ in A Smeulers and R Haveman (eds), *Supranational criminology: towards a criminology of international crimes* (Antwerpen, Intersentia, 2008) 311-334.

imprisonment for – amongst other things – drawing attention to Hutu victims during a genocide memory ceremony.<sup>22</sup>

Memory laws can be means of disconnecting the old repressive regime from the modern regime – the current regime which has acknowledged the violence from the past, now protects that memory (for example, Holocaust denial laws in Germany). A state may thus attempt ‘to redeem its claims of legitimacy through acts of coerced remembering, in which the history of past crimes remains ever present and in which the law serves as the muscle of memory.’<sup>23</sup> But this can also work the other way around, as with prosecutions for acknowledging the Armenian genocide in Turkey: sometimes, the ideologies (in this case the nationalist ideas) underpinning the state are closely connected to *repression* of the memory of past atrocities.

### **ECtHR Perinçek v. Switzerland**

The ECtHR case of *Perinçek v. Switzerland* aptly illustrates many of the dilemmas involved in memory laws. Mr. Perinçek, doctor of law, is a Turkish national and leader of the Worker’s Party (now Patriotic Party) in Turkey. He had participated in various conferences in Switzerland, where he denied that the Ottoman Empire had perpetrated genocide against the Armenian people in 1915 and onwards. He called the Armenian genocide an ‘international lie’, but did not call into doubt that massacres and deportations had taken place against the Armenians: however, he stated that massacres were committed on both sides as part of a ‘battle between peoples’ in which the Turks and the Kurds were defending its homeland against Armenians provoked to violence by imperialist powers. In Switzerland, Perinçek was criminally convicted for genocide denial (which is mentioned under the offence of racial discrimination; the provision in question is drafted broadly and does not mention any specific genocide).

Both the ECtHR’s Chamber and its Grand Chamber judged that this conviction violated Perinçek’s freedom of expression (article 10 of the European Convention on Human Rights), though their reasoning focused on different aspects. They both pointed out that the aim of this conviction had been to protect the honour of the relatives of victims – a legitimate aim. However, for various reasons, the Court in both instances judged the measure

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<sup>22</sup> <http://www.bbc.com/news/world-africa-25371874>.

<sup>23</sup> Douglas, *The memory of judgment* (2001) 220.



disproportionate to the aim pursued. According to the Grand Chamber, a balance needs to be achieved between the right to freedom of expression and the right to private life (art. 8 ECHR), which includes ‘the rights of Armenians to respect for their and their ancestors’ dignity, including their right to respect for their identity constructed around the understanding that their community has suffered genocide’ (par. 227). First of all, Perinçek’s expressions concern a question of great interest to the general public – and as the Court consistently rules, the authorities’ freedom to prohibit expressions which fall within this sphere of public debate is rather small (except when the utterances contain calls for hatred or intolerance, which was not the case according to the Court).

Second, the statements were made in the Swiss geographical context, where (in contrast to Turkey) the debate about this issue was not particularly tense or historically charged and had not led to serious friction between Turks and Armenians. The Grand Chamber held that the justification for criminalizing Holocaust denial – which the Court does find a proportionate restriction of freedom of expression - lies in the historical context: especially in states that have experienced the horrors themselves, Holocaust denial gets a dangerous connotation related to an antidemocratic ideology and to anti-Semitism. In contrast, there is not such a direct link between the Swiss state and the possible consequences denial of the Armenian genocide, the Court holds. Furthermore, the long lapse of time between the events and the expressions plays a role: as time goes on and there are fewer survivors, the need for legal regulation will lessen.

Third, the Grand Chamber does not find the expressions so wounding to the dignity of the victims and survivors and their descendants as to require criminal law measures in Switzerland, since the statements were directed against imperialist powers rather than against Armenians. Finally<sup>24</sup>, the Swiss courts’ argumentation did not make it clear whether Perinçek was convicted for questioning the *legal* qualification of the events (by reference to Swiss and international law on genocide) or for disagreeing with the consensus within Swiss *society* about their characterization. The Swiss Federal Court – disagreeing with the court in second instance – had judged that there was a broad consensus in the community about the characterization of the 1915 events as genocide, which was reflected in political declarations and was formed on the basis of wide consensus among historians. As a result, it was irrelevant to delve into the appropriate legal classification of the events. Whereas the ECtHR’s Chamber

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<sup>24</sup> The Grand Chamber also uses three further arguments, which are less relevant for the purposes of this contribution and will thus not be discussed: (a) the lack of consensus among Council of Europe states about the criminalization of such denials; (b) the lack of international legal obligations for Switzerland to prohibit such speech; and (c) the fact that a criminal conviction is a particularly serious type of interference with freedom of expression.

felt forced to delve into the question of whether such general consensus in society indeed could have existed, the Grand Chamber refused to do so. It merely noted that *if* the Swiss courts meant to say that the prevailing views in Swiss *society* were the reference point, then the applicant's conviction is particularly problematic because it would make it impossible for speakers to express ideas that diverge from those of the authorities or any sector of the population (par. 271).

The argumentation of the Court, while shedding light on various reasons for (and against) criminalizing denial of gross human rights violations, also reveals the problems behind those reasons. In the following parts, I will delve further into these arguments.

### **Protecting the honour of victims: memory laws as hate speech or defamation**

A central reason *in favour of* prohibiting denial of human rights atrocities, which the Court readily accepts, is to protect the honour of the relatives of victims. This is an argument that is often heard in discussions about the criminalization of denial. Indeed, memory laws are often linked to – or immersed in – hate speech and group defamation laws: in Switzerland, denial of the Armenian genocide is also classified under the offence of ‘racial discrimination’.

There are different versions of this argument (just as there are different rationales behind hate speech laws). First of all, denial of genocide can be viewed as a way of defaming the memory of deceased persons<sup>25</sup> – an argument which the Grand Chamber accepts in principle (but which is eventually overruled by freedom of expression considerations).

Second, there is the idea of denial as a means of rehabilitating the repressive regime and thus posing a threat for society in the future. In Stanton's ‘eight stages of genocide’, denial of genocide is included as the final stage: ‘[d]enial is the eighth stage that always follows a genocide. It is among the surest indicators of further genocidal massacres.’<sup>26</sup> Denial starts with the perpetrators themselves - concealing the evidence and inventing euphemistic terms for atrocities is an important tactic to commit genocide - and current denial is thus regarded as a continuation of the perpetrators' original tactics and thereby even as a continuation of the genocide itself.<sup>27</sup> Holocaust denial, for instance, is often regarded as a

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<sup>25</sup> Hennebel and Hochmann, *Introduction* (2011) xliv.

<sup>26</sup> GH Stanton, ‘The 8 stages of genocide’, 1998, [www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html](http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html).

<sup>27</sup> L Douglas, ‘From trying the perpetrator to trying the denier and back again. Some reflections’, in L Hennebel and T Hochmann (eds), *Genocide denials and the law*, (New York, Oxford University Press, 2011) 49.

means of rehabilitating Hitler's regime and image and as bringing back anti-Semitic politics.<sup>28</sup> Whereas this may be the *intention* of certain speakers, whether there is a real chance that such rehabilitation will happen is another question - this risk probably lessens after a certain lapse of time. How strong should the causal link between negationist speech and potential oppression or violence in the present and future be in order to justify criminalizing such speech? Or, alternatively, if the speaker's intention to continue the perpetrators' goals can be proven, is this in itself a reason to prohibit the speech - notwithstanding the potential consequences? But if so, how to discern such an intention - is every expression of every type of denial automatically intended to continue a repressive regime?

The assessment of the potential consequences of such expressions is dynamic, depending on the political, historical and social context – as the ECtHR's Grand Chamber also clearly states. Yet the Court's argument that denial is especially dangerous in societies where the atrocities were actually perpetrated (which the Court uses to argue why it does accept convictions for Holocaust denial in countries such as Germany, Austria and France) also brings up questions. First of all, as the dissenting judges Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis and Kuris (par. 7) hold: what does this imply for the way European countries are to deal with denial of e.g. the Rwandan genocide? Secondly, with all present-day means of communication, coupled with the presence of diaspora communities from different sides, can the impact of an expression be confined to a certain state only? The Grand Chamber does take this into account, but argues that the strict proportionality test inherent in article 10 ECHR 'requires a rational connection between the measures taken by the authorities and the aim that they sought to realise through these measures, in the sense that the measures were reasonably capable of producing the desired result' (par. 246). Though it can be applauded that the Court strictly assesses whether speech can actually lead to certain consequences, it still leaves open the question how such a strict test would turn out if it were applied to Holocaust denial cases (up till now, the Court has not applied such a test in these cases).

Can denial indeed cause a greater danger in the countries where the horrors happened, or is this assessment in itself highly contextual? As the argument goes, Holocaust denial can be a driver for anti-Semitism:<sup>29</sup> deniers accuse the Jewish population of lying about the past, which may eventually lead (again) to hatred and even violence against them. Yet one might

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<sup>28</sup> An argument also used by the ECtHR: ECtHR *Garaudy v France* (inadmissible), 24 June 2003, appl.no. 65831/01; ECtHR *Witzsch v Germany* (inadmissible), 13 December 2005, appl.no. 7485/03.

<sup>29</sup> Human Rights Committee, *Faurisson v France*, Comm.No. 550/1993, U.N.Doc. CCPR/C/58/D/550/1993 (1996).

also expect people, even those with an inclination to support racist viewpoints, to turn their backs on these deniers because their viewpoints are so absurd – *especially* in those societies that have radically broken with their atrocious past and especially after a long lapse of time. This depends on how they frame their viewpoints, but also on the prevalence and form of anti-Semitism in a particular society. In the West, Holocaust denial has long been practiced by individuals and small fringe groups in a loose network who draw on a standard ideological repertoire that are regarded as illegitimate by the greater part of the societies in which they operate.<sup>30</sup> Nevertheless, more recently Holocaust denial has also been practiced by more powerful figures such as the former Iranian president Ahmadinejad. This already points to a more globalised phenomenon (with expressions going around the world through various types of media and being picked up by readers in other continents) – thus it cannot simply be stated that countries per definition have more to fear from denial on their own soil of their ‘own’ genocides.

In cases of state-organized denial such as Turkey (in states that have *not* made this radical break), or in cases where denial is prevalent in broad sections of society, concerns about the actual effects of denial in the public sphere are more pertinent – but the role of the ‘denier state’ in dealing with memory laws is, of course, also radically different.

A third version of the ‘defamation/hate speech’ argument is that the human dignity of survivors, victims’ relatives and/or group members must be protected - the idea is then to prevent direct psychological harm caused by the expressions. As was set out previously, such speech can be threatening to people who have directly experienced the atrocities. It is particularly painful because for them, the idea that the truth will finally come out after years of gross human rights violations is extremely important. The propaganda, euphemisms and lies of authoritarian regimes cause a strong need among the victims of such crimes to bring out the truth, however painful that may be.<sup>31</sup> If victims are - again - not believed and face the burden of proof to convince the outside world of what happened to them, they will find it extremely hard to achieve closure.<sup>32</sup>

And yet this argument leads to a crucial issue: which groups to protect and for how long - only direct victims and their next of kin? Or perhaps the whole ethnic, religious, or other group that they belong to? In other words: how wide is the scope of this argument and for how long can it play a role? The Grand Chamber also delved into this issue, arguing that

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<sup>30</sup> Cohen, *States of denial* (2001).

<sup>31</sup> M Osiel, *Mass atrocity, collective memory, and the law* (New Brunswick, N.J., Transaction Publishers, 1997) 269.

<sup>32</sup> S Garibian, ‘Taking denial seriously: genocide denial and freedom of speech in the French law’ (2008) 2 *Cardozo Journal of Conflict Resolution* 479.

‘a distinction needs to be drawn between, on the one hand, the dignity of the deceased and surviving victims of the events of 1915 and the following years and, on the other, the dignity, including the identity, of present-day Armenians as their descendants’ (par. 155). It follows the Swiss courts in their finding that many of the descendants, especially those in the Armenian diaspora, construct their identity around the genocide. Denial laws may thus be means to protect this identity and thereby protect human dignity (though Perinçek’s expressions, according to the Grand Chamber, were not virulent enough to have a severe impact on the group’s identity and thus significantly damage their human dignity).

The close relationship between memory laws and identity (as well as identity politics) can go in different directions through time. As people become further detached in time from the atrocities, it may sometimes become easier to acknowledge what happened in the past, as public sensitivities can fade away over generations. However, sensitivities may become even stronger over time – especially when a society has experienced a period of (even state-imposed) amnesia and the legacy of certain atrocities has not been discussed in the public sphere.<sup>33</sup> At the same time, maintaining control over official history and alternative accounts ‘becomes increasingly difficult after the passage of time.’<sup>34</sup> As stated before, for the ECtHR this time element was a factor as well (though not necessarily decisive): the Court suggested that with so much time passed since 1915, the need for the law to prohibit expressions is less apparent, even though it is still a pressing issue for Armenians. In other case law regarding historical sensitivities, the ECtHR has also referred to the time factor in a similar manner – such as in *Vajnai v. Hungary*<sup>35</sup>, where a Hungarian demonstrator was convicted for wearing a red star. Besides the argument that the star merely symbolized lawful left-wing political movements instead of totalitarian groups, the Court noted that

‘almost two decades have elapsed from Hungary’s transition to pluralism and the country has proved to be a stable democracy (...) there is no evidence to suggest that there is a real and present danger of any political movement or party restoring the Communist dictatorship (...) The Court (...) accepts that the display of a symbol which was ubiquitous during the reign of those regimes may create uneasiness amongst past

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<sup>33</sup> See Natalia Maystorovich Chulio, ch 13 in this volume; see also W Veraart, ‘Redressing the past with an eye to the future: the impact of the passage of time on property rights restitution in post-Apartheid South Africa’ (2009) 1 *Netherlands Quarterly of Human Rights* 45.

<sup>34</sup> RG Teitel, *Transitional justice* (New York, Oxford University Press, 2001) 105.

<sup>35</sup> ECtHR *Vajnai v Hungary* (2008) 50 EHRR 44. See also ECtHR *Lehideux and Isorni v. France* (Grand Chamber), Reports 1998-VII (1998).

victims and their relatives (...) It nevertheless considers that such sentiments, however understandable, cannot alone set the limits of freedom of expression (...).<sup>36</sup>

A similar argument came back in *Lehideux and Isorni v. France*, concerning an advertisement which justified the actions of Philippe Pétain (chief of state in the Vichy regime). The Court held that ‘even though remarks like those the applicants made are always likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. That forms part of the efforts that every country must make to debate its own history openly and dispassionately.’<sup>37</sup>

The Court thus takes the view that, even though there may be strong sensitivities about a situation lying further in the past which may offend people, this cannot as such provide a reason to legally restrict debate about such issues. Again, however, it should be noted that in cases regarding real Holocaust denial (as opposed to *Lehideux and Isorni*’s justificatory expressions) the Court never mentions this argument; such denial invariably connotes an antidemocratic ideology and anti-Semitism, the Grand Chamber holds. States that have experienced such horrors may even have a ‘special moral responsibility to distance themselves from the mass atrocities that they have perpetrated or abetted by, among other things, outlawing their denial’ (par. 243).

### **Accusing the victims of lying**

We have seen that denial of gross human rights violations is regarded as a means of defaming victim groups because they are thereby accused of lying about what happened, thus adding insult to injury. If a speaker explicitly adds this accusation to a denial claim, this could be a reason to speak of ‘aggravated denial’ which is particularly serious, because it also targets a group of people.<sup>38</sup> The *Perinçek* case, however, shows that it is not always clear from an expression whether a speaker is actually accusing a group of lying. At first sight, it needs little imagination to see an accusation of lying in *Perinçek*’s qualification of the Armenian genocide as an ‘international lie’. For the partly dissenting judges Vučinić and Pinto de Albuquerque (to the Chamber’s judgment), these words contributed to the conclusion that Mr.

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<sup>36</sup> Par. 49.

<sup>37</sup> ECtHR (Grand Chamber) *Lehideux and Isorni v. France*, 23 September 1998, par. 55. See also ECtHR *Orban and others v France*, 15 January 2009, appl.no. 20985/05.

<sup>38</sup> Hennebel and Hochmann, *Introduction* (2011).

Perinçek must have had the intention to accuse ‘the victims and the world’ of falsifying history, of labelling the Armenians as the aggressors and thus justifying the genocidal politics of the Ottoman state: ‘Les expressions «mensonge international», «*historische Lüge*» et «*Imperialistische Lüge*» qu’il a employées (...) revenaient à traiter les victimes de menteurs’ (par. 25).<sup>39</sup>

Yet when looking at the context of this expression, one may also conclude that Perinçek’s aim was merely to take a stance against what he regards as imperialistic tendencies – he virulently criticizes the ‘imperialistic’ actions by the West and Tsarist Russia against the Ottoman Empire in the past and links it to the alleged current attempts by the US and Europe to impose a certain view of history. The Grand Chamber thus concluded that Perinçek did not call for hatred or intolerance.

It gets still more difficult when a speaker does not explicitly accuse anyone of lying but merely makes a ‘factual’ assertion (‘bare denial’).<sup>40</sup> Holocaust deniers often imitate the conventions of normal historical scholars, building up extensive factual arguments with footnotes etcetera; as such, it becomes even more difficult to distinguish bad intentions while at the same time also guarding the freedom of ‘real’ historical research.<sup>41</sup>

Whether the speaker’s real aim was this malicious, can sometimes be assessed by reference to his or her other speeches and actions – thus, courts can try to assess this intention by looking very closely at the context and the position of the speaker. The Swiss courts in the Perinçek judgment inferred such dishonest motives from the fact that Perinçek identified himself with Talaat Pasha, architect of the Armenian genocide. The ECtHR’s Chamber took note of Perinçek’s identification with Pasha, but judged rather legalistically that he was only convicted for genocide *denial*, not justification or relativisation of genocide (so the court did not have to deal with the question whether he had justified the atrocities). The Grand Chamber held that there was not enough evidence ‘that the applicant’s membership in the so-called Talaat Pasha Committee was driven by a wish to vilify the Armenians and spread hatred for them rather than his desire to contest the idea that the events’ (par. 186). It may be questioned whether the Court would also use such arguments in the context of the Holocaust: what if a defendant would deny that these atrocities constituted genocide and meanwhile state that he identified himself with Hitler?

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<sup>39</sup> ‘The expressions “international lie”, “*historische Lüge*” and “*Imperialistische Lüge*” amount to treating the victims as liars’.

<sup>40</sup> Khan, *Holocaust denial and hate speech* (2011).

<sup>41</sup> Douglas, *The memory of judgment* (2001) 235.

## General consensus

Some states restrict memory laws to a limited number of mass atrocities (e.g. those atrocities which have been perpetuated or supported by the state itself), so that the law still leaves open the debate about other historical events.<sup>42</sup> In this regard, the argument could be made that certain historical occurrences have attained a special ‘sacral’ status, such as the Holocaust has in the West, thus marking a radical break in time. Yet the question of how the law can put certain ‘truths’ beyond contestation and not others gives rise to complex dilemmas, especially in cross-cultural contexts where different groups may regard different events as ‘sacral’ and may not share each other’s sensitivities.

The Swiss courts in Perinçek’s case, noting that the wording of the Swiss law was not limited to denial of specific genocides, tried to solve this by pointing to the ‘general consensus’ that existed in society about the characterization of the Armenian atrocities as a genocide. According to the Swiss courts, it was not necessary for the purposes of this case that the Armenian genocide be recognised as a genocide by an international court or that expert witnesses be called upon for proof that it was a genocide; the Armenian genocide is a proven historical fact recognized by the Swiss legislature and there is a general consensus in society (especially within the academic community) about its legal characterization as genocide.

The use of the general consensus argument is understandable from the viewpoint that, without it, the courts in denial cases will run the risk of being asked to judge on the truth or falsity of the historical facts at issue. The trial against Holocaust denier Ernst Zundel in Canada shows how badly this can turn out: the criminal procedure gave the defendant the chance to contest the facts of the Holocaust – facts that were already long known – to the fullest, calling in witnesses and casting doubt on every little detail.<sup>43</sup> Though the trial ‘seeks to reaffirm the *shared memory* that the negationism questions’<sup>44</sup>, it runs a risk of failing to do so because ‘the law ultimately will remain less interested in safeguarding history than in preserving the conditions of its own complex normativity and discursive neutrality.’<sup>45</sup> Relying on criminal law to deal with genocide denial can thus ‘contribut[e] to the erosion of the very boundary between truth and falsehood that the law has been asked to police.’<sup>46</sup> To what extent

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<sup>42</sup> Khan, *Holocaust denial and hate speech* (2011) 94.

<sup>43</sup> Douglas, *The memory of judgment* (2001).

<sup>44</sup> Fronza, *The punishment of negationism* (2006) 611.

<sup>45</sup> Douglas, *The memory of judgment* (2001) 256.

<sup>46</sup> Douglas, *The memory of judgment* (2001) 261.



a criminal trial runs these risks is also dependent on the domestic legal context (e.g. adversarial versus inquisitorial systems).<sup>47</sup> In Europe, lawmakers and courts have tried to solve this by treating the Holocaust as an undisputable fact about which so much consensus exists that proof in court is not required. However, in the present case this led the Swiss courts first to consider whether the Armenian genocide could also be viewed as such an indisputable fact – and to do this, in turn, they needed to assess whether an equal consensus exists. This was, according to the Swiss Federal Court, a question about the general characterization of the events – among the broad community, as reflected in political declarations, and as based on a wide academic consensus among historians. This is a different issue than the strictly legal characterization or the existence of international court rulings.<sup>48</sup> As such, the courts in fact tried to *refrain* from writing history themselves (which they would have had to do if they would *not* have concluded that the Armenian genocide was an indisputable historical fact).<sup>49</sup>

Yet in the ECtHR Chamber's view, there was an important distinction between the Perinçek case and past ECtHR cases on Holocaust denial: in those cases, it was decisive that concrete historical facts were denied that had been clearly established by an international court.<sup>50</sup> This argument was not followed by the Grand Chamber (par. 243), whose argument for distinguishing Holocaust denial from the present case focused on historical context. Indeed, the requirement of 'clearly established historical facts' may turn out to be unfair: the question whether gross human rights violations have been acknowledged as such by an international tribunal (or even brought to justice before an independent tribunal at all) is, after all, dependent on many factors that may be rather arbitrary and politically motivated - as becomes clear from the aftermath of the Armenian genocide itself. In any case, proving gross human rights violations in a criminal court is fraught with difficulties. Because of the incentives of parties in the trial and the confined legal categories, because of the selectivity in cases and the risks as regards the political dimension of the truth as set forth by international tribunals, one may ask whether it is a good idea at all to base the regulation of expressions after mass atrocity on the historical truth that comes out of such procedures.<sup>51</sup> Of course, such

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<sup>47</sup> RA Khan, *Holocaust denial and the law. A comparative study* (New York, Palgrave Macmillan, 2004).

<sup>48</sup> International courts have never dealt with the Armenian genocide; however, various persons have been convicted for the Armenian massacres before Turkish military courts. See VN Dadrian, 'The documentation of the World War I Armenian Massacres in the proceedings of the Turkish Military Tribunal' (1991) 4 *International Journal of Middle East Studies* 549.

<sup>49</sup> In this regard the ECtHR's Grand Chamber itself explicitly states that it is not its task to determine whether the massacres and mass deportations can be characterized as genocide under international law – as the dissenting judges Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis and Kuris note, the Court is particularly timid in this regard.

<sup>50</sup> Par. 117.

<sup>51</sup> See Osiel, *Mass atrocity* (1997); MA Drumbl, *Atrocity, punishment and international law* (New York, Cambridge University Press, 2007); RA Wilson, *Writing history in international criminal trials* (New York, Cambridge University Press, 2011).

historical ‘truths’ may be revisited in later trials where debates may be reopened. Yet this would then mean that memory laws need the same fluidity, which brings with it much legal uncertainty and a further potential ‘chilling effect’ on freedom of speech.

This uncertainty, however, is even more pressing when one takes the general consensus in society as a starting point. When is there enough consensus in society and in politics about the correct interpretation of the past, and when is this based on a sufficient academic consensus? Also, the decision whether or not to support a political declaration to this end can itself be guided by political rather than truth motives, as the Swiss courts also stated. Moreover, the general consensus argument hides from view those atrocities that the greater part of society is not yet willing to face or that have not received equal attention for political reasons, as Belavusau argues: narratives that ‘were deprived of equal competition on the “free market of historiographies”’, such as atrocities of the winning parties to a conflict.<sup>52</sup> Indeed, memory laws leaving the narratives of groups of victims out while protecting others can convey the message that what happened to them is not worthy of acknowledgment. Also, in multiculturalized societies judges and lawmakers may not yet be well acquainted with the historical ‘sacred spheres’ of groups that do not belong to the majority, which can easily lead to misunderstandings. In that regard, the Grand Chamber is right to point out that the ‘consensus in society’ requirement would be very problematic with regard to the freedom to express dissenting views.

Should we then leave this all to the legislature – in the sense of accepting only those denial laws that refer to specific genocides as laid down in the text of the law (as suggested in the partly concurring and partly dissenting opinion by Judge Nussberger)? This will, however, lead to similar problems of minority voices and memories having a hard time being accepted.

## **Facts and interpretation**

Setting certain mass atrocities beyond contestation seems to set clear, defined limits to speech. However, what to do when someone contests certain isolated facts, or contests the interpretation of or responsibility for these facts? Perinçek’s argument was that he only questioned the legal characterization of the Armenian atrocities as genocide, and did acknowledge the massacres and deportations as such. For the ECtHR’s Chamber, this made his case different from most of the Holocaust denial cases it has been confronted with, where

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<sup>52</sup> U Belavusau, ‘Historical revisionism in comparative perspective: law, politics, and surrogate mourning’, *EUI Working paper* 12/2013, available at SSRNpapers.ssrn.com/sol3/papers.cfm?abstract\_id=2368955, 2.

defendants denied the gas chambers and other facts that have been clearly established.<sup>53</sup> The Grand Chamber noted that ‘it can hardly be said that by disputing the legal qualification of the events, the applicant cast the victims in a negative light, deprived them of their dignity, or diminished their humanity’ (par. 156), though it did accept that Perinçek actually did more than that – he also *justified* those acts in the name of self-defense (rather than merely denying their legal characterization). According to the Grand Chamber, however, he did not do so in a way that relativized their gravity or presented the acts as right.

What to think of this distinction between denial of the facts and disputing the legal characterization of these facts? Is Perinçek’s interpretive denial less serious than literal denial? We have seen that it is not merely knowledge, but particularly acknowledgment which is vital in transitional justice processes, and that concerns facts, interpretation and implications. This becomes very clear in the Perinçek case: for many, real acknowledgment of the Armenian atrocities is acknowledgment as genocide. However, going down the road of prohibiting all types of speech which call interpretations into question, raises more difficulties than criminalizing literal denial: judging on interpretive issues brings the courts even closer to mingling in academic freedom.<sup>54</sup>

It is not always so easy to distinguish between literal, interpretive and implicatory denial. Depending on context, questioning the appropriate legal category may also be a covert way of making people doubt what happened. Interpretive differences can be very sensitive and may also be used in malicious ways that are actually meant to justify (implicatory denial) or trivialize the facts and rehabilitate the regime that caused them – take, for instance, revisionist arguments that juxtapose different crimes (such as the Rwandan ‘double genocide’ theory<sup>55</sup>). According to Charny, ‘[o]ne discerns a point where the hairsplitting clearly obscures the genocidal event as a reality and banishes moral outrage and sensitivity to the infamy of the event and its tragedy (...) These disputations and definitional controversies take on appearances of legitimate intellectual-scholarly differences when they are basically contrived gimmicks and manoeuvres, at times quite malicious, to get away with denying crimes of genocide.’<sup>56</sup>

Yet trying to differentiate ‘malicious’ from ‘honest’ motives for engaging in such discussions is an arduous task for the authorities, as has been argued in the previous section.

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<sup>53</sup> See also ECtHR *Lehideux and Isorni v. France* (Grand Chamber), Reports 1998-VII (1998).

<sup>54</sup> Belavusau, *Historical revisionism* (2013).

<sup>55</sup> In the Rwandan context, this refers to the thesis that the Rwandan genocide is equivalent to the atrocities committed by the RPF against Hutus.

<sup>56</sup> Charny, *A classification of denials* (2003) 23-24.

An argument against punishing interpretive denial is that the use of such laws can lead to endless legal fights over the appropriate category to apply to a particular situation - especially over the concept of genocide which has increasingly gained a symbolic status as representing ultimate evil (and, in the eyes of some, bringing with it a duty for the international community to intervene by using force).<sup>57</sup> In many ongoing debates about history, it is questionable whether such juridification - with opponents labelling each other as criminal deniers if they refuse to use the appropriate qualification - adds to society's coming to terms with its past.<sup>58</sup>

Historical and legal interpretations change over time: new facts and previously silenced narratives come to the fore, which lead to other interpretations and competing visions. Indeed, every generation rewrites the past from its own perspective with new insights about who is (most) responsible and what should be the appropriate legal qualification of events. This process is indeed not necessarily innocent and may be used for malicious motives, sometimes even by powerful parties such as states themselves. However, memory laws can easily target expressions which *are* actually part of a normal process of re-interpretation rather than malevolent distortions. The authorities may still regard such issues - for instance, about the responsibility of different actors in a conflict - as too sensitive to discuss and thus label them as 'malicious' - acting upon their own political interests in setting forth certain interpretations and silencing others. Therefore one may ask whether a potentially repressive instrument such as the criminal law is the right tool to separate less benign forms of historiography from free speech, and thus to regulate the way past atrocities are discussed in the public sphere.

## Conclusion

Criminal laws on acknowledgment and denial of gross human rights violations can be regarded as very particular transitional justice mechanisms, which can play a role in determining the scope of the public sphere within which the memory of such conflicts is discussed. State authorities may have different rationales for adopting memory laws, or for using them in particular ways.

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<sup>57</sup> See L. van den Herik, 'Over anti-genocide paparazzi en de mythische aantrekkingskracht van het G-woord' (2011) 3 *RM Themis*.

<sup>58</sup> A. Robben, 'From dirty war to genocide: Argentina's resistance to national reconciliation', (2012) 5 *Memory studies* 305.

Memory laws are strongly related to one of the core goals of transitional justice: ‘truth-telling’ in the sense of turning knowledge into official acknowledgment of what happened. They aim to counter the widespread denial that tends to accompany gross human rights violations, in order protect the honour of victim groups and to safeguard collective memory within society as a whole. This does, however, bring up the question of which groups to protect and over how many generations (especially in situations where the generation that has effectively lived through the atrocities is no longer there). After a certain lapse of time, it can become more difficult to set limits to the public sphere whereas one may also expect the risks for public order (the risk that the repressive regime will be rehabilitated) to become smaller. Though peoples’ sensitivities about the past may sometimes heighten in later generations – especially as regards aspects of the past have been covered up before – the justification for restricting free discussion about the past arguably becomes weaker over time.

Even though memory laws may serve ostensibly laudable goals, depending on their exact formulation they risk making the public sphere of contestation over the past so small that ‘coming to terms with the past’ in turn leads to repression of basic freedoms. Indeed, when the ‘sacred sphere’ covered by memory laws is large, the public sphere thereby shrinks and spaces for contestation and varying interpretations become so small that transitional justice may turn against itself.

In the fluid public sphere of transitional justice, ‘truths’ are continuously contested and new interpretations come up. This process may also be used by people and groups with less benign motives who try to blur the boundary between truth and falsehood in order to defame victim groups and claim legitimacy for atrocious regimes. However, they often do so in sophisticated ways, such as by putting forward arguments relating to interpretations of historical events rather than clearly lying about facts. Trying to differentiate ‘malicious’ from ‘honest’ motives for engaging in such discussions is an arduous task. Using a repressive instrument such as the criminal law to set limits to the public sphere, can lead to a situation where political interests in setting forth certain interpretations and silencing others seep through; especially when such laws extend to interpretive and implicative denial. Criminal trials based on denial laws, depending on the type of procedural system, also run the risk of becoming vehicles in the hands of defendants to bring doubts about the past - even about facts that have long been established - into the public sphere (though they are actually meant as a tool of closing off such discussions). Indeed, the ECtHR’s judgment itself may have inadvertently cast such doubts about the Armenian genocide – in this respect it is interesting to note that the dissenting judges Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis

and Kuris felt the need to express ‘That the massacres and deportations suffered by the Armenian people constituted genocide is self-evident. The Armenian genocide is a clearly established historical fact.’

The Perinçek case makes it clear that the choice for putting certain atrocities beyond contestation and not others brings up complex dilemmas, especially in cross-cultural contexts where different groups may regard different events as ‘sacral’ and may not share each other’s sensitivities. The ECtHR, even with its elaborate argumentation in this case, has great difficulties to justify how its older case law on Holocaust denial can be reconciled with these new questions before it – and it is not difficult to predict what kinds of challenges the future will bring.

The use of memory laws as a kind of ‘backstop’, as a means of safeguarding the ‘truths’ set forth in other transitional justice mechanisms such as international criminal trials and truth commissions, also gives rise to dilemmas: the ‘truths’ set forth by these mechanisms may be incomplete or politicized. Memory laws that restrict the public sphere by taking into account the sensitivities of some groups but not others, can convey the message that what happened to the groups that have been ignored is not worthy of acknowledgment. The range of acknowledged narratives changes over time (new criminal trials cover new terrains, for example), but if memory laws follow such fluid transitional justice processes, that could create much legal uncertainty and have a further potential chilling effect on the public sphere where such narratives are discussed.

These are some first thoughts about the potential of memory laws as transitional justice mechanisms; detailed empirical research (e.g. about the impact that criminal trials have on the way certain aspects of history are discussed and valued) is necessary in order to determine the real impact of such laws on the public sphere in which truth and memory of past conflicts are debated. For now, I conclude that because of all the challenges involved, the potential of memory laws to police the public sphere after mass atrocity is disputable. The challenges posed may turn out to be insurmountable problems, which the regulation of collective memory by means of a crude instrument such as criminal law inevitably poses.

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